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CHARLES ELMORE

No. 559

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

CITY OF HARRISONVILLE, MISSOURI,
PETITIONER,

VS.

W. S. DICKEY CLAY MANUFACTURING
COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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VS.

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COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The petitioner, City of Harrisonville, Missouri, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals, for the Eighth Circuit, entered in the above entitled cause on August 5, 1932, opinion by District Judge Cant (R. p. 185), (61 Fed. (2d) 210), petition for rehearing being overruled October 5, 1932 (R. p. 196), affirming, subject

to a slight modification, the decree of the District Court for the Western District of Missouri, District Judge Reeves (R. p. 177), (not reported).

A.

QUESTIONS OF GENERAL LAW INVOLVED.

How far may a court properly go in prescribing by injunction what a municipality shall or shall not do?

1. Whether, in a case where a municipality of two thousand people has constructed a general sewer system essential to its sanitation terminating in a permanent concrete disposal plant practically self-operating, which by reason of its inherent character manifest from its first operation removes from the sewage sixty per cent only of the putrescible matter and discharges the effluent at a point in a wooded pasture in the line of the City's natural drainage, well beyond the city limits and the proximity of any human habitation, into a watercourse that rises in the town and has always received the natural drainage of the filth and waste of the town, and which plant inflicts by such discharge of effluent a property damage to such pasture land of $100.00 per year—whether a court, in an action by such landowner should hold such disposal plant to be a *temporary* nuisance, the further use thereof to be enjoined unless the town shall erect an additional disposal plant costing $30,000.00; or whether the court, because of considerations of public interest and because of the substantial character of the structure, should hold the same to be a *permanent* nuisance,

not subject to be abated by court order, but affording to the aggrieved property owner a right of action for original and final damages.

2. Whether a court, by the character of its order of injunction, may properly so far command the legislative functions of the municipality as to require it to build an additional sewage disposal plant as the price of the continued use of its sewer system.

3. Whether in such a case a court may properly make such an order, regardless of the City's financial inability to comply under the revenue limitations of the state constitution.

4. Whether equity will consider a continuing property damage of $100.00 a year sufficient ground for enjoining a municipality of two thousand people from the further use of its general sewer system unless such municipality erects an additional sewage disposal plant costing $30,000.00.

B.

QUESTIONS OF LOCAL LAW INVOLVED.

1. Whether said sewer plant is. (a) by virtue of its physical character, and (b) by virtue of the public interest which it serves, a permanent nuisance not subject to be abated by court order, but affording the aggrieved property owner a right of action only for original and final damages.

The United States Circuit Court of Appeals herein says, "No." The courts of Missouri say, "Yes."

2. Whether, in view of the undisputed evidence of the City's financial condition, showing a total annual tax levy at the maximum legal rate for general revenue purposes of $6,120.59 and an unexhausted bonding power of only $12,583, it has the financial resources, by virtue (1) of its general revenue funds, or (2) of its bonding power, or (3) of some method of special assessment, to erect as a part of the public sewer system in question an additional sewage disposal plant costing $30,0000.

The United States Circuit Court of Appeals herein says, "Yes." The Constitution of the State of Missouri, Sections 11 and 12 of Article X, and the courts of Missouri say, "No."

STATEMENT.

W. S. Dickey Clay Manufacturing Company, on August 31, 1928, filed in the District Court of the United States for the Western Division of Missouri, its petition (R. 2) complaining that the petitioner herein, City of Harrisonville, Missouri, and the Missouri Pacific Railroad (a nominal defendant) were operating a sewer system terminating in an Imhoff tank, located on one side of the railroad right-of-way, which discharged its effluent by a tile running thereunder into a creek on plaintiff's land; and alleging that said Imhoff tank was merely a primary disposal plant and that "by reason of the failure and refusal of the City to construct, maintain and operate proper and adequate secondary disposal facilities for its sewage,

a nuisance is created" (R. 8, Par. 13), and the waters of the stream running through plaintiff's wooded pasture land are polluted, all to the plaintiff's damage; and praying the court for an award of damages and that the City "be perpetually enjoined from the discharge into the said watercourse upon the plaintiff's land of raw sewage and/or from the effluent of an improper, inadequate and insufficient sewage disposal plant, and that the defendant City of Harrisonville be given a reasonable time to construct and place in operation a sufficient and adequate sewage disposal plant" (R. 10).

Five years previous to the institution of such action, to-wit, in 1923, the City of Harrisonville, population 2,000, for compelling sanitary reasons (R. 96, 72, 73), constructed the sewer system in question at a cost of approximately $60,000.00, through the sale of bonds, exhausting the City's constitutional debt-making power for that purpose (R. 74, 83).

The City is located on the top of a gentle rise with the land falling away in all directions (R. 42). Town Creek rises in the northeast part of town (R. 73, 77), circles through the town on the north (map, Defendant's Exhibit B, R. 159), passes beyond the city limits on the west, and turns south across plaintiff's land where, in its southerly course (R. 141), it receives the effluent from the aforesaid sewer system. This point is a quarter of a mile from any human habitation (R. 141). The pasture is used and has been used for grazing cattle only (R. 38, 43).

In 1923, Walter S. Dickey, president and majority stockholder in respondent company, owned the pasture land in question and continued to own it up until 1925, the date of the Delaware incorporation of said company (R. 42). Respondent, with full knowledge of the sewer and its discharge, acquired the property in question in 1925 (R. 42).

The Imhoff tank in question is a concrete structure roughly 23 feet deep, 20 feet long and 21 feet wide, divided into several chambers (Defendant's Exhibit B, R. 161, 163) and costing approximately half of the entire cost of the sewer system (Exhibit B, R. 161). It removes approximately only sixty per cent of the putrescible matter (R. 51, 77, 86). This characteristic of the plant is inherent and permanent (R. 52, 51). By the erection of a secondary disposal plant at a cost of approximately $30,000.00 (R. 52), further putrescible matter might be removed up to the aggregate amount of ninety per cent (R. 95, 180).

The trial court found that the respondent had sustained a property damage to the extent of $100.00 a year (R. 181), for the five-year period between the time that it acquired this property in 1925 and the date of the court's decree in 1930; and also that it would cost $3,500.00 for such excavation of the creek as would remove from it all of the marks of pollution (R. 15, 70). The only evidence (R. 50) of any more efficient method of sewage disposal was that of an additional plant to cost approximately $30,000.00 as aforesaid.

The trial court's decree does not mention in express terms a secondary plant, but that is what the respondent referred to in its petition (R. 7, 10), and that is what it offered as proof (R. 50), and that is what the court's decree refers to in effect in paragraph (3) thereof (R. 15, 180).

The trial court entered a judgment against the City of Harrisonville, petitioners here, in the amount of $4,000.00 consisting of $500 for five years continuing damage, and $3,500 representing the excavation item (R. 15), and enjoined the City "from the discharge of putrescible sewage matter into said watercourse on or above said plaintiff's land," with a provision that the City should have six months in which to abate the nuisance (R. 16), that being the time estimated required to construct the additional disposal plant (R. 181).

The Circuit Court of Appeals (R. 193) affirmed this decree except for the item of $3,500.00 excavation cost which it directed be eliminated therefrom.

The decree thus modified requires in effect that the City erect the additional plant or abandon its sewer system.

The evidence concerning the City's financial ability to build a secondary system fell under two heads: (1) the City's general revenue fund, including its resources therefor; (2) the City's debt-making power, including its outstanding bonded indebtedness.

1. The general revenue fund of the City, it is undisputed, is limited by Section 11, Article X, of

the Constitution of Missouri to a levy not exceeding fifty cents on the $100.00 valuation. At the present time the City levies its taxes at this maximum rate (R. 112). The City does not make its own property valuation, but the same as required by law is reported to it each year by the county clerk (R. 113), and the last assessment thus reported prior to the trial was that of June 1st, 1928, in the amount of $1,224,118.00 (R. 101), covering both real and personal property. On this basis, making no deductions for uncollectible items, which are considerable (R. 102), the annual general revenue fund is $6,120.59. This literally is scarcely sufficient to pay the City's ordinary current expenses (R. 112).

A $30,000.00 improvement to be paid for over a period of ten years with five per cent interest on deferred payments, if paid from the general revenue fund under Section 7276, R. S. Mo., 1929, enacted in 1929, as contended by the respondent could be done, would require for the first year out of the $6,000.00 fund an expenditure for the new disposal plant of $4,500.00, and would require annual expenditures thereafter of substantially the same amount, all in addition to the City's ordinary current expenses, which must be paid first out of general revenues.

2. The bonding power of the City at the time of this improvevment in 1923, subject to one exception which will later be specifically named, is limited by Section 12, Article X, of the Constitution of Missouri to the amount of "five per centum on the value

of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness," and this is available only upon a two-thirds vote of the voters, at an election held for the purpose of obtaining their consent. At the time of trial the last assessment answering this description was that of June 1st, 1927, showing (R. 101) an amount of $1,101,672.00, of which amount five per cent equals the sum of $55,083.00. At the time of the trial there remained unpaid bonds incurred for this very sewer improvement in the amount of $39,000.00, and another item of bonds outstanding of $3,500.00 (R. 100, 102), leaving unexhausted and available out of a $55,083.00 City debt-making power, the sum of $12,583.00.

The excepted additional debt-making power referred to in the opening of the last paragraph is that enjoyed by the City under Section 12-a, Article X, of the Constitution of Missouri for specific purposes that do not include sewers. This power the City of Harrisonville has exercised, as is shown in its financial statement by the item of waterworks bonds outstanding in the amount of $100,000.00 (R. 102).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED BY THE PARTIES HERETO.

Section 11, Article X, Constitution of Missouri (cited by petitioners):

> "Taxes for county, city, town and school purposes may be levied on all subjects and objects of

taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for state and county purposes. For county purposes the annual rate on property, in counties having $6,000,000.00 or less, shall not, in the aggregate, exceed fifty cents on the $100.00 valuation; * * * in cities and towns having less than 10,000 and more than 1,000 inhabitants, said rate shall not exceed fifty cents on the $100.00 valuation. * * * Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness." (Constitution of the State of Missouri, adopted 1875, R. S. Mo. 1929, page 137.)

Section 12, Article X, Constitution of Missouri (cited by petitioners):

"No county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness, * * *." (Constitution of the State of Missouri, adopted 1875, R. S. Mo. 1929, page 139.)

Section 12-a, Article X, Constitution of Missouri (cited by petitioners):

> "Any city in this state, containing not more than thirty thousand (30,000) inhabitants, may, with the assent of two-thirds (2/3) of the voters thereof voting at an election held for that purpose, be allowed to become indebted in a larger amount than specified in Section 12 of Article X of the Constitution of this state, not exceeding an additional ten (10) per centum on the value of the taxable property therein for the purpose of purchasing or constructing waterworks, ice plants, electric or other light plants, to be owned exclusively by the city so purchasing or constructing the same: * * *." (Amendment to Constitution of the State of Missouri, adopted 1920, R. S. Mo. 1929, page 142.)

Section 7217, Revised Statutes of Missouri, 1929 (cited by petitioners), merely reiterates in statutory form the constitutional provisions of Section 12, Article X.

Section 7031, Revised Statutes of Missouri, 1929 (cited by respondent):

> "Board May Establish Sewer Systems. The board of aldermen shall have power to cause a general sewer system to be established, which shall be composed of three classes of sewers, to-wit: Public, district and private sewers. Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed or entirely new throughout, as may be deemed expedient. The board of aldermen may levy a tax

on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and repairing of such work, which tax shall be called 'special public sewer tax,' and shall be such amount as may be required for the sewer provided by ordinance to be built; and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repairing of said sewer." (This statute must be read in the light of *Union Trust Co.* v. *Pagenstecher Tax Collector*, 221 Mo. 121, 119 S. W. 1103, which holds that in so far as it attempts to provide for a *public* sewer on an assessment or special tax plan it is unconstitutional as violative of Section 11, Article X of the Constitution of Missouri.)

Section 7032, Revised Statutes of Missouri, 1929 (cited by respondent), covers the subject of *district* sewers, how they may be established, and paid for, on an assessment basis by the issuance of special tax bills.

Section 7037, Revised Statutes of Missouri, 1929 (cited by respondent), provides that two or more *district* sewers may be united into a *joint district sewer*.

Section 7038, Revised Statutes of Missouri, 1929 (cited by respondent):

"PURIFYING DISCHARGE, HOW PAID FOR. Whenever the city shall deem it necessary it may, by ordinance, provide for the construction of a septic tank or other sewage reduction device for the purpose of purifying the discharge from any *district or joint district sewer*. In such case the cost thereof shall be assessed against the lands in the district or joint district for which the same

is provided in the same manner as is provided for the assessing of the cost of district sewers."

Section 7276, Revised Statutes of Missouri, 1929 (enacted in 1929) (cited by respondent):

"AUTHORIZED AND EMPOWERED TO PROVIDE MEANS TO PROTECT PUBLIC HEALTH. In addition to all powers now possessed by cities of the second, third and fourth classes in this state for the protection of the public health, each city of the second, third, or fourth class of this state is hereby authorized and empowered to provide for the gathering, handling and disposition, either by itself, or by contract with others, for the gathering, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste accumulating in such cities, *and to pay for the same out of general revenues or by collection of charges for such service*, and to do such other and further acts as may be deemed expedient for the protection and preservation of the public health, as such public health may be affected by the accumulation of trash, cinders, garbage, refuse matter and municipal waste; to acquire by purchase, construction, lease, gift or otherwise, within or without the corporate limits of such cities an incinerator or incinerators for the destruction of such garbage, trash, cinders, refuse matter and municipal waste; to acquire by any of such means all equipment necessary or expedient for use in the collection, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste; *to acquire by any of such means a purification plant or plants or sewage disposal plant for the purification of all sewage accumulating in such cities.* Such incinerator or incinerators, equipment, purification plant or plants or sewage disposal plant, may be acquired by such cities with funds derived from the issue and sale of bonds in the manner provided

by law for the issue and sale of bonds for other public purposes; *or such may enter into contract for the construction or purchase of such incinerator or* ***incinerators, equipment*** *or purification plant or plants or sewage disposal plant to be paid for out of the general revenues of such cities in annual installments*: Provided, however, that the period of payment for any such incinerator or incinerators, equipment, purification plant or plants or sewage disposal plant, or any contract for the construction, purchase or lease thereof out of the general revenues of such cities shall not extend over a longer period of time than ten (10) years." (Laws of Missouri, 1929, page 319.)

COURT DECREES.

Decree of District Court.

(July 10, 1930, R. 15.)

"This cause came on to be further heard at this term and was argued by counsel and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows:

"1. The court finds the issues upon the plaintiff's bill of complaint in favor of the plaintiff and against the defendants.

"2. The court finds that the effluent from the sewage system and the sewage disposal plant of the defendant City of Harrisonville is discharged into Town Creek, a watercourse flowing through and upon the land of the plaintiff; that such effluent pollutes and contaminates said creek (rendering) it filthy and creating in said creek and upon and over the land of the

plaintiff noxious and offensive odors; that by reason of the discharge of said effluent into the said watercourse a nuisance is created in said watercourse in and upon plaintiff's land.

"3. The court finds that it is unnecessary for the defendant City of Harrisonville to discharge raw or partially treated sewage into the said watercourse upon plaintiff's land, and that the defendant City may by use of reasonable means available to said defendant City abate the said nuisance, and that six months' time from the date of this decree is a reasonable time within which the said defendant City may abate said nuisance.

"4. The court finds that by reason of the said nuisance and the continuance thereof to date plaintiff has been damaged by loss of rents and profits from its said land in the sum of five hundred dollars ($500.00) and by reason of the cost and expense of restoring said creek to the condition in which it existed prior to the creation of said nuisance by said defendant City in the sum of three thousand five hundred dollars ($3,500.00).

"5. (This paragraph deals with the Missouri Pacific Railroad Company, merely a nominal defendant.)

"Wherefore, it is ordered, adjudged and decreed, that plaintiff have and recover of the defendant City of Harrisonville the sum of four thousand dollars ($4,000.00) with interest thereon at the rate of six per cent per annum from this date with costs to said

plaintiff to be taxed, and that plaintiff have execution therefor. It is further ordered, adjudged and decreed that the defendant City of Harrisonville be and it is hereby enjoined from the discharge of putrescible sewage matter into said watercourse in, on, or above said plaintiff's land; provided, however, and it is further ordered, adjudged and decreed that the said defendant be, and it is hereby given a period of six months from the date of this decree in which to abate the said nuisance by such adequate and effective method or methods as the said defendant City may select to prevent, cease and determine the discharge of putrescible sewage matter into the said watercourse in, on or above said plaintiff's land. It is further ordered, adjudged and decreed that and the court hereby reserves jurisdiction of this cause for the rendition of such further orders with respect to enforcement and execution of this judgment and decree as shall be deemed by the court necessary in the premises. To all of which judgment, order and decree the defendants except."

Decree of Circuit Court of Appeals.

(August 8, 1932, R. 193.)

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the

decree of the said District Court, in this cause be, and the same is hereby, modified by eliminating therefrom the item of three thousand five hundred and no/100 ($3,500.00) dollars allowed to the plaintiff, the W. S. Dickey Clay Manufacturing Company, and as thus modified the said decree is hereby affirmed.

"It is further ordered that the appellant, City of Harrisonville, Missouri, pay one-third of the costs and the appellee, W. S. Dickey Clay Manufacturing Company, pay two-thirds of the costs on the appeal in this court."

REASONS FOR REVIEW.

A.

Questions of General Law Involved.

Few fields of the law are more wanting in well beaten paths of judicial decision than that dealing with the extent to which a court may properly go in prescribing by injunction what a municipality shall or shall not do; and there are few fields of the law wherein decisions may affect more people in more ways running the complete gamut from pocketbook to health and life.

Increasingly important become decisions in this field as the density of population and the burden of taxation increase.

1.

TEMPORARY OR PERMANENT NUISANCE.

In the two-fold realm of municipal sanitation and taxation, it would seem that under the compelling social considerations of community life, the more enlightened view with reference to the maintenance of an alleged nuisance by the municipality is that the preponderance of consideration is to be given the public welfare as against any mere claim of property damage which can be compensated for in money. While there is substantial conflict on the subject in the decisions of various courts, many courts representing apparently the majority opinion consider the public interest a deciding factor in determining whether an alleged nuisance is to be classified as temporary and abatable by court order, or as permanent to be entirely compensated for in one action for damages. In effect, at least in many instances, this latter view is equivalent to a condemnation proceeding. A true condemnation proceeding is purely statutory and often, as in the present case, the legislature has failed to foresee the necessity and provide the machinery therefor.

The Circuit Court of Appeals, according to its opinion, has given but brief consideration to this matter which is the major issue of the lawsuit. That court's sole pronouncement on this point in the course of a ten-page opinion consists of two widely separated paragraphs, as follows:

> (R. 187, 193) "The nuisance here in question being such as might be abated by order of court,

is temporary in character, *Foncannon* v. *City of Kirksville,* 88 Mo. App. 279, 284; *Pinney* v. *Berry,* 61 Mo. 359, 367; *Ready* v. *Mo. Pac. Railway,* 98 Mo. App. 467, 470, and plaintiff is entitled to injunctive relief. *Carmichael* v. *Texarkana,* 94 Fed. 561, 571, 573, 574; also 116 Fed. 845, 849 (C. C. A. 8); *Mo.* v. *Illinois & Chicago Drainage District,* 180 U. S. 208, and authorities cited at pages 245-247; *Winchell* v. *City of Waukesha,* 110 Wisconsin 101; *Haskell* v. *New Bedford,* 108 Mass. 208, 216; *et seq.* * * *

* * * * * * *

"After preparation of the opinion herein attention has been called to the case of *Kent* v. *City of Trenton,* 48 S. W. (2d) 571 (K. C. Court of Appeals). Upon any one of two or more grounds specified in the opinion, that case was rightly decided. It has been called to the attention of this court because of the statements therein as to the character of the nuisance there involved. In reliance upon the numerous authorities hereinbefore cited, including several cases decided by the federal courts in this circuit, we adhere to the views hereinbefore expressed."

Observe in the first paragraph quoted a clear case of reasoning in a circle. Because the nuisance may be abated by court order, that is, may be enjoined, it is a temporary nuisance and therefore it may be enjoined.

2.

JUDICIAL ATTEMPT TO COMPEL EXERCISE OF LEGISLATIVE POWER.

Any employment by a court of the writ of injunction against a municipality involves a consideration

of the distinctions in our governmental scheme between judicial and legislative powers. Especially is this true if the injunction in question is in effect a mandatory one. Mandatory, petitioner contends, is the present injunction, despite the fact that it is couched in negative terms. It takes on this mandatory character because the operation of the order is deferred for a period of six months, that being the time required under the proof for the erection of an additional disposal plant; and because such a plant was the sole method suggested in the pleadings and the proof and the opinion of the court by which the City could continue the operation of its sewer system with a substantially diminished discharge of putrescible matter. Under the pleadings, the proof and the decree, therefore, the City can do only one of two things, either erect this additional plant or discontinue the use of its sewer system.

> (Decree, R. 16) "It is further ordered, adjudged and decreed that the defendant City of Harrisonville be and it is hereby enjoined from the discharge of putrescible sewage matter into said watercourse in, on or above said plaintiff's land; provided, however, and it is further ordered, adjudged and decreed, that the said defendant be, and it is hereby given a period of six months from the date of this decree in which to abate the said nuisance by such adequate and effective method or methods, as the said defendant City may select to prevent, cease and determine the discharge of putrescible sewage matter into the said watercourse in, on or above said plaintiff's land."

However, the erection of a secondary disposal plant involves legislative functions with which the court may not rightfully interfere. The city council would have to pass a resolution deeming and finding it necessary to construct an additional disposal plant and calling for the preparation of plans and specifications and an estimate of costs. After receipt of such plans and specifications the council would have to pass an ordinance requiring the work to be done. After the action by the mayor and city clerk in securing bids the council would have to pass an ordinance awarding the contract to the lowest and best bidder if his bid were within the estimate.

These steps would have to be taken regardless of whether the money to pay for the improvement were to be drawn from the City's general revenue fund or from the sale of bonds. And in the latter case the proposition for the sale of bonds for such purpose would further have to be submitted to the voters and be carried by a two-thirds majority vote.

Moreover, in an undertaking to erect this plant through one other plan suggested by respondent, to-wit, the establishment of sewer districts and the payment for the plant by special assessments upon property owners, the sewer districts would have to be established by ordinance (assuming at this point for argument's sake that the same could be done lawfully, notwithstanding the fact that the present sewer system is a *public* sewer), and the City would also by ordinance have to provide that it deemed the construction of an additional plant necessary, and pro-

vide for the assessment of the cost of such construction against the lands in the sewer district.

One paragraph in the opinion of the Court of Appeals, and only one, makes some approach to this matter, but at that falls short of actual contact therewith, because this question is not, as the Circuit Court of Appeals appears to think, whether a sewer system is or is not beyond judicial control. So far as any conflict between legislative and judicial functions is concerned, it may be conceded, at least for the purpose of this case, that *a court has the right to enjoin a city from further use of its sewer system.* The point of this case lies yet ahead, to-wit, *may the court* by the conditional character of its decree, in effect, *require the City to construct an additional disposal plant?* If it cannot, then the construction of such a plant has no place as a factor influencing the court to issue its order of injunction.

The sole paragraph in which the Court of Appeals disposes of this matter reads as follows:

> (R. 187.) "The fact that the sewage system and the Imhoff tank in question were installed pursuant to the direction of the governing body of the city does not place them beyond judicial control. *Carmichael* v. *Texarkana,* 94 Fed. 561, 570-574. Approved in case of same title at 116 Fed. 845, 849 (C. C. A. 8). *Winchell* v. *City of Waukesha,* 110 Wis. 101. *Seifert* v. *City of Brooklyn,* 101 New York 136, 139, *et seq.,* 143 *et seq.*"

3.

DISREGARD OF CITY'S REVENUE LIMITATIONS UNDER THE STATE CONSTITUTION.

An order which in effect requires a city either to abandon its general sewer system or to erect an additional sewage disposal plant in connection therewith, must take into consideration the city's financial resources for compliance with the latter alternative, under the applicable revenue limitations of the state constitution and statutes. Those limitations, under the undisputed evidence of the City's financial condition, make it impossible for the City to erect the additional disposal plant in question, and leave the City no alternative under the decree but to abandon the use of its general sewer system. See Sections 11 and 12, Article X, Constitution of Missouri, herein set out at pages 9-10 and *Union Trust Co.* v. *Pagenstecher, Collector*, 221 Mo. 121, 119 S. W. 1103, holding that under the Constitution of Missouri a municipality may not pay for a public sewer by special assessment, any statute to the contrary notwithstanding.

The sole reference in the opinion of the Court of Appeals to this matter refers only to statutory provisions and makes no mention of the constitutional limitations. That reference is as follows:

> (R. 193.) "An examination of the statutes of Missouri indicates that the financial difficulties, which defendant claims would render it impossible to comply with the decree herein, are not insurmountable."

4.

Disparity Between the Injury and the Requirements of the Decree.

Regardless of whether the nuisance be classed as permanent or temporary, and of whether the order in question is an invasion of legislative functions, and of whether the City may within its constitutional and statutory limitations provide the funds for such a disposal plant, yet the fact remains that equity does not uphold a decree requiring the City to expend an additional $30,000.00 merely for the purpose of saving the plaintiff a continuing property damage of $100.00 per year. In such case, even if the court consider that the structure in question is a temporary nuisance, the award of temporary damages without any order of abatement is sufficient. The door still remains open for the recovery of subsequently accruing damages. But to put a small municipality, which has exhausted its bonding limit in providing, on account of the health of its people, a sanitary sewer system, and which has placed the outlet thereof as directed by law and without any purpose of malice against respondent, to an immediate expenditure of an amount equal to the total damage sufferable by respondent over a period of three hundred years is not in conformance with equity principles.

REASONS FOR REVIEW CONTINUED.

B.

Questions of Local Law Involved.

1.

TEMPORARY OR PERMANENT NUISANCE.

In the field of state law, petitioner points out that the sewer system and disposal plant in question should have been held herein to have been a permanent rather than a temporary nuisance for two reasons, either alone sufficient: (1) The physical character of the structure, and (2) the public interest therein. That is the holding of the Missouri courts, and in holding otherwise the District Court and the Circuit Court of Appeals herein fell into direct conflict with the law of Missouri. The sole expression of the Circuit Court of Appeals on this subject is that already quoted herein under A-1, page 18.

Missouri Decisions.

Kent v. *City of Trenton*, (Dec., 1931, Kansas City Court of Appeals, part of the Missouri system of appellate courts of last resort), 48 S. W. (2d) 571, l. c. 575, (not yet reported in official Missouri reports):

> "The petition attempts to base a cause of action upon the wrongful construction and maintenance of the original sewer. It is too plain for controversy that it is not based upon an increase of sewage occasioned by the new sewer after 1923. The original sewer was completed in 1914 and put in use. The outfall pipe was carried across a part

of the land in question and terminated thereon, and thereafter discharged sewage on the land. It was permanent as distinguished from a temporary structure or a so-called continuing nuisance which was likely to be abated. It is entirely obvious that damage did then result and would inevitably result and continue indefinitely. This damage was to the inheritance. There was an actual entry upon and possession of the land which was open and adverse in character. There is no showing that it was permissive under a license revocable at will. Under the circumstances, a cause of action for the damage arose immediately, and this cause of action accrued to the then owner of the land and was not transmitted to plaintiffs as subsequent grantees. *Hayes* v. *Railroad*, 177 Mo. App. 201, 208, 162 S. W. 266; *Powers* v. *Railroad*, 158 Mo. 87, 102, 57 S. W. 1090; *Luckey* v. *Brookfield*, 167 Mo. App. 161, 151 S. W. 201; *Smith* v. *Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; *Smith* v. *Sedalia*, 244 Mo. 107, 149 S. W. 597; *Irvine* v. *City of Oelwein*, 170 Iowa 653, 150 N. W. 674, L. R. A. 1916E, 990; *Payne* v. *Smith*, 198 Ky. 564, 249 S. W. 995; 27 R. C. L., Section 292. Permanent structures of a public character such as sewers and railroads resulting in damage from trespass or nuisance are regarded as unabatable, and the damage occasioned is at once recoverable. See cases *supra*."

Hayes v. *Railroad*, (Dec., 1913, Springfield Court of Appeals, also part of the Missouri system of appellate courts of last resort), 177 Mo. App. 201; 162 S. W. 266, is a case dealing with a railroad embankment that in wet weather backed up water over the plaintiff's land. The court therein, while pointing out that except for a special Missouri statute on the subject of railroad embankments, an embankment constitutes

a permanent nuisance, quoted from certain cases the rule which it adopted as its own, to-wit:

> (l. c. Mo. App. 210; l. c. S. W. 269): "In *Powers* v. *City of Council Bluffs*, 45 Iowa 652, 656, 659 (24 Am. Rep. 792) a case often approved by the courts of this state, the court said: 'While no infallible test can be applied to enable us to determine whether a structure is permanent or not, in as much as nothing is absolutely permanent, yet, when a structure is practically determined to be a permanent one, its permanency, if it is a nuisance, and will necessarily result in damages, will make the damages original. * * *.'"
>
> (l. c. Mo. App. 211; l. c. S. W. 269): "* * * The cause of action is single and the statute of limitation bars it where the injuries are permanent, because the nuisance causing them is permanent just the same as if the injuries are inherently permanent. In *James* v. *Kansas City*, 83 Mo. 567, 570, the court, quoting from *Powers* v. *Council Bluffs*, 45 Iowa 652, 24 Am. Rep. 792, says: 'Whenever the nuisance is of such a character that its continuance is necessarily an injury, and when it is of a *permanent character* that will continue without change from any cause but human labor, there the damage is an original damage, and may be at once fully compensated'" (court's own italics).

In the case of *Smith* v. *Sedalia*, (June, 1912) 244 Mo. 107, 149 S. W. 597, the court in holding a certain sewer and its outlet to be a permanent nuisance, said:

> (l. c. Mo. 121, l. c. S. W. 600): "We cite with approval the following from the opinion of Johnson, J., of the Kansas City Court of Appeals in this case:

"'These authorities compel us to say that the nuisance in question is permanent and that plaintiff, if injured thereby, had a cause of action for his damages, past and future, all of which were comprehended in and were to be measured by the depreciation in the market value of his land caused by the presence of the sewer. For eighteen years past the sewer had remained in its present condition. It is just as substantial and enduring as a railroad embankment, drainage ditch, highway bridge, street pavement, office building or city hall. It was built without any intention or expectation that it would be removed or materially changed for years to come; and if the present action was one for permanent damages, and was the only suit pending between the parties, we would not hesitate in declaring that plaintiff had made out a case for the jury, and that the true rule for measuring his damages w[illegible] the depreciation in the market value of the land.'

* * * * * * *

(l. c. Mo. 125, l. c. S. W. 601): "For still another reason, there can be no injunction in this case. The writ of injunction is an extraordinary remedy. It does not issue as of course, but somewhat at the discretion of the chancellor. It is his duty to consider its effect upon all parties in interest, and to issue it only in case it is necessary to protect a substantial right, and even then not against great public interests. An apt discussion and application of this doctrine are contained in the opinion of Lamm, J., in *Johnson* v. *Railway*, 227 Mo. loc. cit. 450, 127 S. W. 63. Surely no chancellor would enjoin the further operation of this large and costly sewer system, with the attendant danger to public health and convenience, when it clearly appears that any injury caused to plaintiff by the sewer can be fully compensated by a pending action at law."

Horine v. *People's Sewer Co.*, (June 1918, Springfield Court of Appeals) 200 Mo. App. 233, 204 S. W. 735: Here in this Horine case the plaintiffs sought to enjoin the discharge of city sewage upon their land. The court denied the injunction, citing as authority the above case of Smith vs. Sedalia, and quoting the last paragraph above quoted, and then following that with the following language of its own:

> (l. c. Mo. App. 237, l. c. S. W. 736): "The comparative injury rule seems not to have found much footing in this state, except where the public weal will likely substantially suffer if the injunction is granted; and, where the result of such public injury is so great on the one hand as compared to the injury complained of on the other, then it would be unconscionable to grant injunctive relief, and it will be denied (*Johnson* v. *Railroad, supra*), and certainly there can be no question in such circumstance when the party seeking injunctive relief has an adequate remedy at law. It is not the disparity in dollars and cents that furnishes a foundation for denying injunctive relief (*Steinmetz* v. *Federal Lead Co.*, (Sup.) 176 S. W. 1049), but the immeasurable value of the health and comfort of the public on the one hand as compared to a few dollars on the other. It was such a condition as last mentioned of which the Supreme Court was speaking when it used the language above quoted, to the effect that no chancellor under such circumstances would give injunctive relief when there was an adequate remedy at law."

2.

CONFLICT OF THE DECREE WITH CITY'S REVENUE LIMITATIONS UNDER THE STATE CONSTITUTION.

The price exacted by the court's decree for the City's continued use of its sewer system is its erection of an additional sewage disposal plant at a cost of $30,000.00. The City's financial statement shows that it has an empty treasury at the present time; that it has an annual general revenue income of only $6,-120.59, less such items of general levy as cannot be collected, and that it requires all of this amount for its ordinary current expenses which the law says are first to be paid out of this fund; that its unexhausted bonding resource is only $12,583.00.

Nor does the City have any power to pay for such an improvement by the third and last method suggested, to-wit, by special assessment under Section 7038, or Section 7276, R. S. Mo. 1929. First, incidentally, it must be realized that this Section 7276 is a new statute enacted in 1929 and not in existence and not conferring powers of any kind in 1923 at the time the sewer system was built. In the second place, neither this Section 7038 nor this Section 7276 nor any other section of the statutes can, even if so worded, confer power upon the City to raise the necessary funds by special assessment, because the sewer system here in question is a *public* sewer. The Supreme Court of Missouri has held that any attempt to construct a *public* sewer by a special assessment or special tax bill method is in violation of the State Con-

stitution, Section 11, Article X (*Union Trust Company v. Pagenstecher, Collector*, 221 Mo. 121, 119 S. W. 1103).

It is vitally important in the system of laws in this country that the courts, including the federal courts, shall make no order upon a municipality which ignores the constitutional limitations under which that municipality operates. The sole expression of the Circuit Court of Appeals on the subject of the City's financial difficulties has been quoted above (p. 23) under A-3.

Conclusion.

For these reasons it is respectfully submitted that this petition should be granted.

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BRIEF.

Opinions.

Full reference to the opinions appears in the opening prayer of the petition, page 1.

The Time Elements of Jurisdiction.

The time elements of jurisdiction are as follows:

August 8, 1932 (R. 193): Decree of Circuit Court of Appeals.

September 6, 1932 (R. 194): Petition for rehearing filed in Circuit Court of Appeals.

October 5, 1932 (R. 196): Order denying petition for rehearing.

December 19th, 1932: Petitioner files herein this petition and brief and the record.

Facts.

The facts are as stated in the petition, page 4, but petitioner calls special attention to the following:

1. Dates:

1923, the sewer system is constructed and put into operation;

1925, respondent acquires the property in question with full and intimate knowledge of said sewer system and the discharge therefrom;

1928, respondent files its bill in equity for injunction;

1930, the case is tried and decree is entered by the District Court;

1932, the decree subject to a slight modification is sustained by the Circuit Court of Appeals.

2. The present sewage disposal plant is substantial and permanent in its character of construction, is practically self-operating, and from the moment of its completion and first use has been manifestly inherently incapable of operation except in the manner found by the court to be objectionable, to-wit, by discharging an effluent carrying 40% of putrescible matter.

3. It is part of a public sewer system as distinguished from a district or joint district sewer system.

4. Its use is essential to the welfare of the municipality.

5. The damage found to be inflicted is property damage only and relatively inconsequential.

6. Respondent offers as the only solution for the continued operation of the sewer system with a discharge of substantially less putrescible matter, an additional disposal plant estimated by its own engineer to cost as much as $30,000.00.

7. The City at the time of constructing the present disposal plant issued bonds in the maximum of its constitutional authorization therefor and is without the

funds or the resources to secure the funds necessary to build such an additional $30,000.00 plant.

(a) The City's total annual *general revenues* amount to only about $6,000.00 and the erection of a $30,000.00 plant on a ten-year installment payment plan with interest at 5% would call for an expenditure from this fund the first year of $4,500.00, and amounts almost that large in succeeding years.

(b) It has available an unexhausted *bond resource* of only $12,583.00.

(c) It is denied by the state constitution, Section 11, Article X (*Union Trust Co.* v. *Pagenstecher, Tax Collector,* 221 Mo. 121, 119 S. W. 1103) the power to construct any part of a *public* sewer by the method of a special assessment (see Argument, p. 52).

ARGUMENT.

Jurisdiction of Subject Matter.

In the matter of general law the petition (p. 17) has already pointed out that the question concerning which petitioner alleges that the decision of the Circuit Court of Appeals is probably untenable and in conflict with the better rule, is an important one in its relation to the public interest.

In the matter of local law, petitioner amplifies here the reasons assigned in the petition for the statement that the law involved in the case is a matter of local law. The case involves the *property rights* of the City in its sewer system and it involves also the *property rights* of the respondent. In addition, and probably most importantly, it involves the definite constitutional limitations imposed upon the City by Sections 11 and 12, Article X of the Constitution of the State of Missouri and the construction thereof by the Supreme Court of the State of Missouri in *Union Trust Company* v. *Pagenstecher, Tax Collector,* 221 Mo. 121, 119 S. W. 1103. It also involves Section 7031, Revised Statutes of Missouri, 1929, as specifically construed in said last mentioned case of Union Trust Company, and also Sections 7038 and 7276, Revised Statutes of Missouri, 1929, which are subject to the same constitutional ruling as made in said Union Trust Company case with reference to Section 7031, which the Supreme Court in said case held to be unconstitutional as violative of Section 11,

Article X of the Constitution of Missouri, in so far as it might provide for the construction of a *public* sewer by special assessment.

That the foregoing are matters of local law governing the federal courts, has been long recognized in this court.

Swift v. *Tyson*, 16 Peters 1:

Justice Story in a case involving commercial paper, discussing the extent to which the law of the state was controlling on the federal courts said (l. c. 18):

> "In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th Section (Judiciary Act of 1789 requiring the federal courts in certain cases to follow the state law) limited its application to state laws strictly local, that is to say, to the positive statutes of the state and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character."

Jackson v. *Chew*, 12 Wheat. 153:

This case involved a will construction as applied to real estate. The court said:

> "The rule is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property has been settled in the state courts,

the same rule will be applied in this court that would have been applied by the state tribunals."

See also the following:

Green v. *Lessee of Neal*, 6 Peters 291, l. c. 296;
Des Moines National Bank v. *Fairweather*, 44 S. Ct. 23;
American Mfg. Co. v. *City of St. Louis*, 39 S. Ct. 522;
Hancock v. *City of Muskogee, Oklahoma*, 39 S. Ct. 528;
Jones v. *Prairie Oil & Gas Co.*, 47 S. Ct. 338, 273 U. S. 195, 71 L. Ed. 602.

The instant case is an excellent illustration of the importance of recognizing in the federal courts the local law of a state governing the question of nuisance as it relates to a municipal sewer plant. Mr. Walter S. Dickey was the owner of the land in question in 1923 when the sewer in question was built and the characteristics here objected to first manifested. As a citizen of Missouri whose rights would necessarily be determined in the courts of that state, he was clearly subject to the rule there existing as subsequently reaffirmed in the Missouri decision specifically referred to and overridden by the Circuit Court of Appeals in this case, to-wit, *Kent* v. *City of Trenton*, 48 S. W. (2d) 571 (see petition p. 25). Subsequently he organized the W. S. Dickey Clay & Mfg. Co., respondent, under the laws of the State of Delaware and in the character of a foreign corporation comes into the federal court asking for an order of abatement, clearly denied by the state law. Is the abatable character of a municipality's

sewer plant to depend upon the question of domestic or foreign citizenship of the owner of the land affected?

It is unnecessary to carry the illustration on with reference to the constitutional revenue limitations applicable to the City.

Legal Merits.

A.

1. *The public interest is a strong factor in determining that a nuisance be classed as permanent rather than temporary.*

According to the United States Supreme Court Digest from the year 1882 down to date, and the Federal Digest for the period before that time, the subject of nuisance seems to have received comparatively little consideration from the Supreme Court of the United States, and concerning the differentiation between temporary and permanent nuisance, there seems to have been an almost total lack of pronouncement by such court. Some ruling from this court concerning that matter is of tremendous importance to thousands of municipalities throughout the country.

Four Missouri cases on this subject have already been cited and quoted from the petition, pages 25-29, to-wit:

Kent v. *City of Trenton*, 48 S. W. (2d) 571,
Hayes v. *Railroad*, 177 Mo. App. 201, 162 S. W. 266;
Smith v. *Sedalia*, 244 Mo. 107, 149 S. W. 597;
Horine v. *Peoples Sewer Co.*, 200 Mo. App. 233, 204 S. W. 735.

Petitioner further cites and quotes as follows:

Corpus Juris, Volume 46, page 804, on the subject of nuisance, says:

> "Where property is injured by permanent structures or conditions that cannot be abated because of the public interest, either party is entitled to demand that permanent damages be awarded."

Rhodes v. *Durham*, 165 N. C. 679, 81 S. E. 938: This was a case involving the pollution of a watercourse by a municipal sewer in which the court held the plaintiff entitled to recover as for a permanent nuisance and used the following language, l. c., S. E. 939:

> "Our decisions are also in support of the proposition that where the injuries are by reason of structures or conditions permanent in their nature, and their existence and maintenance is guaranteed or protected by the power of eminent domain, or because the interest of the public therein is of such an exigent nature that right of abatement at the instance of an individual is of necessity denied, it is open to either plaintiff or defendant to demand that permanent damages be awarded; the proceedings in such cases to some extent taking on the nature of condemning an easement. *Brown* v. *Chemical Co.*, 81 S. E. 463, *Id.* 162 N. C. 83, 77 S. E. 1102; *Harper* v. *Lenoir*, 152 N. E. 723, 68 S. E. 228; *Geer* v. *Water Co.*, 127 N. C. 349, 37 S. E. 474; *Parker* v. *R. R.*, 119 N. C. 677, 25 S. E. 722; *Ridley* v. *R. R.*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708."

Bartlett v. *Grasselli Chemical Co.*, 92 W. Va. 445, 115 S. E. 451, 27 A. L. R. 54. In this case the court says, l. c. A. L. R. 58:

"In actions against counties, cities, towns, and other municipal corporations, and railroad companies and other public utility corporations, clothed with the power of eminent domain, for injuries inflicted upon or done to real estate owned by private persons, by reason of the negligent or wrongful construction of their works, the cause of injury is generally deemed to be permanent. Of course, it is possible to conceive of extreme cases in which such corporations might injure or damage property by resort to methods and acts altogether unnecessary to the performance of their public functions, in consequence of which it would not be possible for them to obtain the right, under the power of eminent domain, to do so. In such a case, the wrongful act would, no doubt, be a nuisance, pure and simple; wherefore it could be dealt with as other nuisances. But, ordinarily, the injurious acts of such corporations are necessary in the sense above indicated, and the right to perform them, if not already acquired, could be obtained by the exercise of the power of eminent domain. In almost all cases of that kind, the acts complained of are of such character. Accordingly, it has been uniformly held by this court that the acts of such corporations, working injury and damage to private property, not involving or amounting to a taking thereof cannot be enjoined and abated as nuisances. *Spencer* v. *Point Pleasant & O. River R. Co.*, 23 W. Va. 406; *Arbenz* v. *Wheeling & H. R. Co.*, 33 W. Va. 1, 5 L. R. A. 371, 10 S. E. 14; *Watson* v. *Fairmont & Suburban R. Co.*, 49 W. Va. 528, 39 S. E. 193; *Ohio River R. Co.* v. *Gibbens*, 35 W. Va. 57, 12 S. E. 1093. Although in these decisions, as well as the decisions in similar cases in other jurisdictions, the right of recovery is based in terms upon the theory of negligent construction, the real ground of liability seems to be the constitutional provision guaranteeing compensation for private property damaged for public use.

This provision inhibits the taking of property for public use, by a company incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; but it does not provide for payment of compensation, or security therefor, as a condition precedent to right to damage private property for public use. It impliedly gives the right to inflict such damage, but, at the same time, it makes the corporation liable for compensation therefor. Even the guaranty against the taking of private property for such purpose, without antecedent payment of compensation or security therefor, may be waived, without losing the right to compensation. *Briar Creek R. Co.* v. *Kanawha Central R. Co.*, 70 W. Va. 226, 73 S. E. 726. When, in such cases, the injury is immediate and direct, the damages are regarded as original and permanent, and the permanency of the cause is one of the elements upon which the conclusion is based. *Smith* v. *Pt. Pleasant & O. River R. Co.*, 23 W. Va. 451; *Guinn* v. *Ohio River R. Co.*, 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; *Blair* v. *Charleston*, 43 W. Va. 62, 35 L. R. A. 852, 64 Am. St. Rep. 837, 26 S. E. 341; *Keene* v. *Huntington*, 79 W. Va. 713, L. R. A. 1917F, 475, 92 S. E. 119."

Corpus Juris on Injunctions, Vol. 32, p. 81:

"On an application for an injunction, it is the duty of the court to take into consideration the injury or inconvenience which may result to the public in case an injunction is awarded."

Texas and Pacific Railroad Company v. *Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385.

2. *The judiciary may not properly compel exercise of legislative power.*

Speciously, upon surface consideration, it may be argued that the present decree makes no reference to the exercise of any legislative powers by the municipality, that the decree merely enjoins the City from discharging putrescible sewage matter into the watercourse in question. However, that decree is subject to three comments: (1) That it provides a six-months' period of suspension of the order, (2) that no matter how careful the City may be in the operation of its present plant, the same, according to respondent's own evidence, by virtue of its inherent character, will always produce an effluent containing about 40% of putrescible matter, and (3) that the method plead in respondent's petition (R. 7), and the only method testified to in the evidence as a means of modifying the character of this effluent, is that of the erection of an additional disposal plant costing, according to respondent's own engineer (R. 52), twenty-five to thirty thousand dollars. The six months of suspension of the decree is for the purpose of enabling the City to build that plant in the interim.

Viewed from the standpoint of the pleadings and the proof, the decree is undeniably in effect an alternative decree requiring (1) that the City erect the additional plant, or (2) abandon the use of its sewer system. If this statement be true, then is not the following reasoning sound:

(1) The court may have the power to prohibit absolutely the use of the present sewer system, in which event, however, the wisdom and justice and advisability of such decree must rest upon the simple alternative of sewer or no sewer whatever.

(2) The court might, if the City were already undertaking the erection of an additional disposal plant, have the power to take that into consideration as a reason why an absolute injunction against the use of the sewer system should not immediately become operative. But where no such undertaking for a new plant is afoot, then so far as the court has been moved to issue an absolute injunction subject to a six-months' suspension upon the theory that an enforced abandonment of the sewer system is not justified by the facts of the case but that the City need not abandon its sewer system because it can erect this additional plant, the court has undertaken to invade the legislative functions of the City. The whole underlying purpose and effect of the decree is to say to the City, "Erect an additional disposal plant and thus retain the right to use the present sewer system."

Surely the court may not thus indirectly properly do anything it cannot do directly. This brings us to the question whether the court has the power to require the City to build an additional sewage disposal plant.

The reports and text-books are fairly well filled with decisions concerning the circumstances under which a court may properly hold up the enforcement

of some legislative act, although even here the presumptions are all substantially in favor of the act and the court proceeds with the most extreme caution. But there seems to be practically no authority to justify a court in affirmatively requiring a city to take certain legislative action, where the power of the court so to do has been adequately challenged upon the ground of the distinction between judicial and legislative powers.

The requirements of legislative action on the part of the City for the erection of such a plant have already been referred to at page 21 of the petition.

Standard Oil Co. v. *Marysville*, 49 S. Ct. 430, 279 U. S. 582, 73 L. Ed. 856 (C. C. A. 8th Cir.). In this case the court, declining to interfere with an ordinance of the City of Marysville, Kansas, said:

> "We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety, are not for the determination of courts."

Corpus Juris, on Municipal Corporations, Vol. 44, Sec. 4002, page 1084:

> "Some authorities hold that the construction and maintenance of municipal drains and sewers is a corporate or municipal, as distinguished from a governmental, function; but other authorities take the view that, in the construction and maintenance of a sewer or drainage system, a municipal corporation exercises a part of the governmental powers of the state for the customary local convenience and benefit of all the people. The duty, if any, of the municipality to drain its streets and avenues is

one requiring the exercise of deliberation, judgment, and discretion and is therefore judicial in nature. Mere statutory authority to construct sewers or drains does not impose any duty to exercise such authority; and unless the duty is positively imposed by the state, the municipality has discretion to determine whether it will construct a system of drains or sewers, as well as discretion to determine the nature, extent, capacity, and cost of the system, and the method of financing its construction and maintenance. * * *''

Woods v. *The City of Kansas*, 58 Mo. App. Rep. 272, l. c. 278.

Corpus Juris on Municipal Corporations, Vol. 44, page 154:

"Ordinarily the exercise of the power (to make public improvements), to any extent deemed proper is a governmental act to be exercised under legislative discretion, and is not subject to the control of the courts."

The power of the City to construct sewers is delegated to it by the Legislature, as a legislative power under Sec. 7031, R. S. Mo. 1929, and subsequent sections.

The construction of sewer systems and sewer plants is a matter affecting the public health, and in all matters affecting the public health, the actions of the City are under the police powers of the state, and are legislative. *Haeussler Investment Co.* v. *Bates*, 306 Mo. 392, l. c. 407-412, 267 S. W. 632, l. c. 634-636.

It has been held in the following cases that a municipality is liable in damages for personal injuries sustained by workmen employed in the course of construction of sewer plants. However, both of these cases

point out the distinction between the City's governmental functions and the ministerial duties. See *Thurston* v. *The City of St. Joseph*, 51 Mo. 510, l. c. 519; *Donahoe* v. *Kansas City*, 136 Mo. 657, l. c. 666, Corpus Juris on Municipal Corporations, Vol. 43, pp. 179-182, 272, 296-308.

It must be conceded, therefore, that the decision to build a secondary plant is the exercise of a legislative function. The next question is: What right has the court to issue an order requiring of the city legislative or governmental action?

Corpus Juris, on Municipal Corporations, Vol. 43, page 299, Sec. 314:

> "The necessity and propriety of particular ordinances or regulations are primarily matters for legislative determination. Matters of mere municipal policy are not for the courts to control. The question of the necessity or wisdom of legislation within the power of a municipal corporation to enact is to be decided by the proper municipal authorities. If the municipal corporation has the power to pass the ordinance or regulation, it is neither within the province nor within the power of the court to question its wisdom or propriety. • • •"

Corpus Juris, on Mandamus, Vol. 38, page 756, Sec. 386:

> "Under general rules already stated, purely administrative functions of sewer commissioners may be enforced by mandamus. But where the duty of providing for and constructing sewers for a municipality is a quasi-judicial or legislative power involving judgment and discretion, such quasi-

judicial or legislative duty will not be controlled by mandamus, although the writ may issue to compel them to act."

32 Corpus Juris, on Injunctions, Sec. 410, p. 260:

"b. Exercise of Discretion. A court of equity will not interfere with the exercise of discretionary powers on the part of a municipal corporation or its officers so long as the limits of those powers are not exceeded, and no fraud, malice, bad faith, or improper motives are shown, for otherwise this would be an assumption by the court of the right to exercise the powers delegated only to the corporation or its officers. * * * It is only where it is clearly shown that the municipal corporation or its officers has transcended the powers vested in them, or that there has been an abuse of discretion, that a court of equity will interfere."

See also, McQuillan on Municipal Corporations, 2nd Ed., Sec. 1562, p. 325, Vol. IV; also Sec. 2871.

3. *The decree violates certain state constitutional revenue limitations that are no less binding upon the court than upon the municipality.*

The discussion under this head will here be deferred until the discussion of the same point in connection with local law.

4. *Equity forbids the expenditure sought to be imposed upon the City for the slight property damage involved.*

It is not the purpose of petitioner here to do more in connection with the petition for writ of certiorari than to call the court's attention to the fact that this

is one of the issues involved, and that aside from all other considerations, equity, it would seem, cannot justify a decree requiring an expenditure by this little community of an amount equalling what would be the accumulation of the plaintiff's damages over a period of possibly three hundred years.

B.

1. *A nuisance structure which is substantial in construction and continuing in effect and which serves the public interest is to be classed as a permanent rather than a temporary nuisance.*

In the realm of local law we are first confronted with the question of temporary or permanent nuisance. The four Missouri decisions quoted from in the petition, pages 25-29, *Kent* v. *City of Trenton*, 48 S. W. 2nd, 571, *Hayes* v. *R. R.*, 177 Mo. App. 201, 162 S. W. 266; *Smith* v. *Sedalia*, 244 Mo. 107, 149 S. W. 597; *Horine* v. *Peoples Sewer Co.*, 200 Mo. App. 233, 204 S. W. 735, would seem definitely to establish that the present sewer system, if a nuisance at all, is a permanent nuisance, first, because of the physical character of the structure and again, because it serves the public interest and may not be abated except by substantial injury to such interest.

2. *The decree violates certain state constitutional revenue limitations that are no less binding upon the court than upon the municipality.*

Only three methods, and they apparently cover the entire field of possibilities, are suggested by the

plaintiff as the means of financing the erection of an additional disposal plant. They are:

(a) Payment out of the general revenues.

(b) Payment by the issuance of bonds.

(c) Payment by special assessment.

The Circuit Court of Appeals has made such brief reference to this major question in the case that we know not which one, or more, of the three methods it deemed available to the City for the purpose of this additional construction. In three lines (R. 193) that court disposes of this question, to-wit:

> "An examination of the statutes of Missouri indicates that the financial difficulties which defendant claims would render it impossible to comply with the decree herein, are not insurmountable."

We are forced therefore to consider each one of these three methods, and what the constitutional provisions and the courts of Missouri say with reference thereto.

(a) PAYMENT OUT OF GENERAL REVENUE FUND: The plaintiff has cited Section 7226, R. S. 1929, and the language found in the body thereof authorizing the City to acquire a sewage disposal plant and to pay for the same, as indicated in the closing phrase of that section, out of the general revenue fund on a ten-year installment basis. There are various subsidiary questions with reference to this statute, such as whether it would be applicable where one disposal plant has

already been erected, which we pass by. We do not ignore, however, the fact that this statute was only enacted by the Legislature of Missouri in 1929, and that in 1923 when the sewer system in question was built and its definite inherent character established and its classification in the field of nuisance once determined, there existed no right in the City to construct such a plant out of general revenues on any ten-year installment basis.

The main objection, however, to the employment of any such method is the total absence of any such general revenue funds. This section merely enables the City to spend its money in this way if it has the money. The undisputed evidence is that the City's general revenue income is only about $6,000.00 a year. If the City were to pay for a $30,000.00 improvement in ten annual installments with interest at 5%, the first installment would have to be $4,500.00, each succeeding installment being $150.00 less than the preceding one. The undisputed evidence, however, is that the $6,000.00 of general revenue income is at the present time wholly consumed in the payment of the City's current running expense. This is fortified by the fact that at the time of trial of this case there was nothing in the City treasury and the salary bills for the preceding month of May, amounting to $881.40 (R. 102, 103) had not yet been paid. Under the law this annual revenue must be used first for the payment of the City's general operating expense, even if the City were disposed to let such items go unpaid for the purpose of erecting a

sewer (*Anderson* v. *Ripley County*, 181 Mo. 46, 80 S. W. 263, l. c. 267).

(b) BONDING POWER: Section 12, Article X, Constitution of Missouri, states the City's authorization for the issuance of bonds and is the sole governing provision on that matter except for Section 12-a thereof to which reference will be made in a moment. The City has outstanding three groups of bonds (R. 102), sewer bonds $39,000.00, waterworks bonds $100,000.00, and other bonds $3,500.00.

The $100,000.00 of waterworks bonds is the exception provided for under Section 12-a, Article X of the state constitution. That is a power which exists for certain specific purposes, that do not include any sewer plant, to-wit: "* * * of purchasing or constructing waterworks, ice plants, electric or other light plants." Furthermore, the City has practically exhausted that power in the present outstanding issue of $100,000.00 of waterworks bonds issued for the recent completion of its water plant. Even if, however, this $100,000.00 had not been issued, no power under this Section 12-a for sewer purposes could enter into consideration here under the specific holding of the Supreme Court of Missouri, in *State ex rel. Carthage* v. *Hackman*, 287 Mo. 184.

Aside from this $100,000.00 the total amount outstanding in bonds is $42,500.00, leaving, as has been pointed out in the facts stated in the petition (page 9), an unexhausted bonding power available of only $12,583.00. It is therefore obvious that even if

the court has the power to affirmatively require the city council and its officers to pass the necessary ordinances and take the necessary steps for the erection of an additional disposal plant, and to compel the voters to vote in favor of additional bonds, the same, in an amount equal to the cost of the erection of an additional plant, would be invalid under the state constitution.

(c) SPECIAL ASSESSMENT: This, it is petitioner's guess, is the one of the three methods that the Circuit Court of Appeals had in consideration in arriving at its decision. It is true that Section 7031, R. S. Mo. 1929, uses specific language authorizing the city board of aldermen to levy a tax "on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and repairing of such work (public sewer), which tax shall be called 'special public sewer tax,' " and it is true that Section 7038, R. S. Mo. 1929, invoked by respondent, does confer upon the City (subject to constitutional limitations) the power to build a sewage reduction device in the case of *district* or *joint district* sewers by special assessment. But this Section 7031, in so far as it thus provides for the cost of the construction of a public sewer, has been held by the Supreme Court of Missouri to be unconstitutional. This is the same provision of the statutes, discussed as Section 5969, Revised Statutes Missouri, 1899, in the case of *Union Trust Company* v. *Pagenstecher, Tax Collector,* 221 Mo. 121, 119 S. W. 1103. In the case cited the court had under con-

sideration an action of the Union Trust Company of St. Louis to enjoin the tax collector from collecting a certain special sewer tax. The lower court issued the order of injunction. This was affirmed by the Missouri Supreme Court in a decision containing this full and specific discussion of the statute in question (l. c. S. W. 1104):

> "The statute under review divides sewers into three classes, *i. e.*, 'public, district, and private sewers.' The tax allowed is only for public sewers, and these are, by the act itself, defined to be such as 'shall be established along the principal courses of drainage,' showing that the purpose was to pay out of public funds only for such sewers as were of utility to the municipality as a municipality, and not such as were especially beneficial to a particular portion of the municipality. For other than public sewers, the succeeding sections provide the manner of payment. District sewers must be paid for by special assessments against the property within the district. Rev. St. 1899, Article 5970 (Ann. St. 1906, p. 3016). Private sewers must be paid for by the individual. Rev. St. 1899, Article 5970a (Ann. St. 1906, p. 3017). So that when the three sections above mentioned, viz., Sections 5969, 5970, and 5970a, are read together it is apparent that the 'special public sewer tax' referred to in Section 5959 is a general municipal tax, and in no sense a special assessment. We do not therefore have to depend upon other indicia of a general tax, but find evidence of the character of this tax in the face of the law itself. The ordinance we have before us conforms to the statute, and we hold that it provides for a general municipal tax, although such tax is set apart for a special municipal purpose. This tax thus appears to be general in the sense of being levied upon all prop-

erty alike within the domain of the taxing authority, but special in the sense only that it is levied for a special purpose or fund. Having fixed the character of the tax provided for by this ordinance, we proceed another step, and to the vital question in this case, to which we devote the next paragraph of this opinion.

"2. Plaintiffs contend that this levy of $2.50 on the $100 valuation is in violation of Section 11, Art. 10, of our State Constitution (Ann. St. 1906, p. 283), and in this we think they are correct. This city has, under the pleadings, an admitted population of more than 1,000 and less than 10,000. By Section 11, Art. 10, of the Constitution, the limit of taxes which may be levied and collected for any one year is 50 cents on the $100 valuation. The section, so far as applicable, reads: '* * * In cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; * * * provided, * * * for the purposes of erecting public buildings in * * * cities * * * the rates of taxes herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such * * * city, * * * voting at such election, shall vote therefor.' And said Section 11 concludes thus: 'Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness.' Under the admissions in the pleadings, and we say 'admissions' because the demurrer admits the truth of the allegations in the petition, the question of this tax was never submitted to the qualified voters of the City of Kirkwood. It is urged for the defendant that the statute (Section 5969, *supra*) does not require the

question to be submitted to the voters; but into this statute must be read the constitutional provision aforesaid (*Evans* v. *McFarland*, 186 Mo. l. c. 727, 85 S. W. 873), and before a legal tax in excess of 50 cents on the $100 can be levied the question must receive the approval of two-thirds of the qualified voters, who vote at an election held for that purpose. That such is the view of this constitutional provision is abundantly shown by the cases. *Book* v. *Earl*, 87 Mo. 246; *Lamar Water Co.* v. *City of Lamar*, 128 Mo. l. c. 221, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157; *State ex rel. Hill* v. *Wabash Ry. Co.*, 169 Mo. 563, 70 S. W. 132; *Aurora Water Co.* v. *City of Aurora*, 129 Mo. 540, 31 S. W. 946; *Brooks* v. *Schultz*, 178 Mo. 222, 77 S. W. 861; *Evans* v. *McFarland*, 186 Mo. l. c. 726, 85 S. W. 873; *City of Lexington* v. *Lafayette Co. Bank*, 165 Mo. l. c. 682, 65 S. W. 943; *City of Stanberry* v. *Jordan*, 145 Mo. 371, 46 S. W. 1093. Several other cases might be cited, but it is so universally held that the constitutional limit of 50 cents cannot be exceeded without a vote upon the proposition that further citation would be but to incumber this opinion.

"Counsel for defendant urges that Sections 11 and 12 of Article 10 of our Constitution undertakes to deal with annual taxes solely, and therefore do not apply; in other words, the contention is that, inasmuch as this tax is to be levied but once, and not annually, year after year, the constitutional restrictions have no force. The constitutional provision does not so read. It applies to all taxes, as will be seen by the reading of the concluding clause, *supra*. It is next urged that the statute and the ordinance can be both held to be within the terms of the Constitution, because the construction of a public sewer is within the police power of the state, and we are cited to the case of *Morrison* v. *Morey*, 146 Mo. 543, 48 S. W. 629, as lending color to this contention. That case had under consideration our law relative to levee districts and land assessments

therein. The case has no application to the case at bar. It does discuss the police power of the state, but winds up with the proposition that the amounts to be collected were not a tax, but an assessment predicated on benefits to the land. Such is not the case at bar, for here we have a tax upon both personal and real property, and not an assessment against lands for benefits accruing thereto.

"Other questions discussed in the briefs need not be discussed here, for counsel for defendant in his brief has well said: 'The real and only point in the case is whether or not the tax levied by the city in excess of the 50 cents for the purpose of building public sewers was in violation of Section 11, Art. 10, of the Constitution of Missouri.'

"From what has been said, it follows that the trial court was right, and its judgment should be, and is, affirmed. All concur."

This decision is the law of Missouri and has since been cited with approval in the following cases: *State ex rel.* v. *Christian County,* 176 S. W. 1, l. c. 3, not officially reported; *Schueler* v. *City of Kirkwood,* 191 Mo. 575, 177 S. W. 760, l. c. 762.

The reasoning of this case on Sec. 7031 applies with equal force to Sec. 7038.

Conclusion.

Because the Circuit Court of Appeals herein has erred in its decision on the differentiation between a temporary and a permanent nuisance, a matter that has apparently never had the consideration of this court, and because it has erred in invading the legislative powers of the City and in ignoring the constitutional revenue limitations governing the City, and has failed

to take an equitable view of the disparity between the injury complained of and the relief decreed, and because it has ignored the local law of Missouri including even the constitution of that state and the decisions of its Supreme Court interpreting the same, imperative reasons of public policy exist for the issuance herein by the Supreme Court of the United States of its writ of certiorari.

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